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as the debt attends the person of the creditor. The question having arisen prior to the adoption of the 14th Amendment, the Courts felt obliged to adopt this rule to protect the natural rights of non-residents from the encroachments of the several States. But the provision of the 14th Amendment, that no State shall deprive any person of property without due process of law, affords the Courts an intelligible and constitutional ground upon which to protect the rights of non-resident creditors within the principles of *Pennoyer v. Neff*, 95 U. S. 714.

CONRAD RENO.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Massachusetts.

BROWN v. CUNARD S. S. CO.

A bill of lading provided, that "in the event of loss or damage for which the ship is responsible, the liability shall not exceed the invoice, or the declared value for the United States customs duty." The goods were damaged to an amount less than the invoice value, but were worth, in their damaged condition, the invoice value, plus the cost of importation. *Held*, that the carrier was liable for the full actual damage.

AT the trial in the Superior Court, the amount of the damage, and the fault of the defendant which caused the damage, were found as stated in the opinion of the Supreme Court. The defendant, however, claimed that as the goods were still worth their invoice value, which was the limit of the defendant's liability, no damage had been shown for which it could be held responsible under the bill of lading, and the Superior Court ruled accordingly.

Frederic Dodge, for plaintiff.

George Putnam and *Thomas Russell*, for defendant.

HOLMES, J. The plaintiff's goods were damaged on the defendant's vessel, through its fault, to the amount of \$151.78, in their market value in Boston, the port of destination, but it did not appear that their market value, as damaged, was less than the invoice value of the sound goods, with the cost of importation added. The bill of lading limits the defend-

ant's liability to the invoice value. See *Graves v. Railroad Co.*, 137 Mass. 33; *Hill v. Railroad Co.*, 144 Id. 284. The only question which we shall consider is whether the language used exempts the defendant from all liability upon these facts. The defendant relies upon some decisions to the effect that a provision that the shipowner will not be liable for more than the invoice value of the goods is to be construed as limiting the liability in case of partial loss to the difference between the net proceeds of each article damaged, and its invoice price and freight, and that if the cargo owner "has received from the sale of the damaged goods the invoice price, after deducting the cost of importation, sale, etc., the libel will be dismissed:" *The Lydian Monarch*, 23 Fed. Rep. 298, 300; *Pearse v. Steamship Co.*, 24 Id. 285, 289. We shall not criticise these decisions further than to say, that if they are not distinguishable from the case at bar we cannot follow them. The bill of lading before us reads: "Ship not accountable for any sum exceeding £100 per package, for goods of whatever description, unless the value is declared, and freight as may be agreed paid thereon, and in event of loss or damage, for which the ship is responsible, the liability shall not exceed the invoice, or the declared value for the United States customs duty." It is plain that these words fix alternative limits of liability; £100 per package, if the value is not declared; the declared value, when it is declared. In the former case we do not suppose that it would be contended that, if a package brought £100, no damage could be recovered, yet unless the argument is carried to that extent we see no reason why, in the latter alternative, the shipowners should escape if the goods bring their invoice price. Looking at the words of the latter branch of the sentence alone, it will be seen that they refer to the "event of damage for which the ship is responsible," and therefore in terms pre-suppose that something is to be recovered in the case for which they provide. The following words, "the liability shall not exceed," etc., are apt words to express the outside limit of the sum to be recovered, but both the particular words and the whole structure of the sentence are most inapt to express a stipulation that if the goods are still equal to the invoice value, there

shall be no recovery at all. Even in the case of a valued policy, which is much stronger than the one under consideration, the rule in most jurisdictions is to leave the valuation entirely on one side for the purpose of determining what proportion of the valuation is to be paid by the insurers upon a partial loss: *Irving v. Manning*, 1 H. L. Cas. 289, 306; *Lewis v. Rucker*, 2 Burr. 1167; *Bradlie v. Insurance Co.*, 12 Pet. 378, 399; *Boardman v. Ins. Co.*, S. Jud. Ct. Mass., March 12, 1888. As we read the contract, the damages are to be ascertained in the usual way by finding the difference in value between each package as damaged and the same undamaged, and these damages are to be paid by the defendants, up to, but not exceeding £100, when the value is not declared, or, in this case, up to, but not exceeding, the invoice value. As the damage to the plaintiff's walnuts did not exceed the invoice value the defendant must pay the whole amount.

Judgment for plaintiff.

The right of a carrier to insert in the bill of lading reasonable limitations both as to the circumstances under which and the extent to which he will be liable, so that the risk he incurs may not exceed what is justly proportionate to the freight paid him, is too well settled to call for discussion here. The meaning, however, of such a limitation as is found in the principal case, and its application when the damage is partial only, deserve some consideration. The writer of this note has found no cases bearing directly on the point, except *The Lydian Monarch*, 23 Fed. R. 298, and *Pearse v. Quebec S. S. Co.*, 24 Id. 285. Both these are cited in the principal case, but the opinion does not state whether this case is to be distinguished from the two former, or stands opposed to them on a question of law.

Whether any distinction can properly be taken between these cases, depends on the meaning of the several restrictive clauses. In *The Lydian Monarch* the words are, "the ship-

owner is not to be liable for any damage to the goods, * * * in any case for more than the invoice or declared value of the goods, whichever shall be the least;" in *Pearse v. Quebec S. S. Co.*, "in case of damages, loss or non-delivery, the shipowners will not be liable for more than the invoice value of the goods;" and in the principal case, "in event of loss or damage, for which the ship is responsible, the liability shall not exceed the invoice, or the declared value for the United States customs duty."

In *The Lydian Monarch*, there is no attempt to explain the language used, but in *Pearse v. Quebec S. S. Co.* it is construed not as a limitation of the company's liability for loss or damage, but as a limitation of their liability for the particular goods lost or damaged. In other words, the Court in that case understand the carriers as saying, not "we are liable for all damage up to the amount of the invoice value of the goods," but, "we are liable for damages, but no goods

damaged shall be estimated to have been worth more than their invoice value. If this construction be correct, it is obvious that the rule adopted for calculating damages in the principal case would not apply, but, as will be shown below, it does not follow that the Court was right in holding further that in case of a damage as distinguished from total loss, the liability was for the difference between the net proceeds of the sale of the damaged goods and their original invoice value, plus the freight, so that, as was said in *The Lydian Monarch*, if enough was realized from the sale to cover the latter sum, there was no liability at all.

In the principal case, the clause is held as a limitation of liability for loss or damage, as indicating merely the maximum that can be recovered on this ground, and the judgment follows logically from this construction.

If these restrictive clauses have been rightly construed in each case, and the contracts were not intended to be of the same effect, then the principal case is clearly distinguishable from the others. The similarity of the language used in each case, however, and the fact that such limitations of liability have been in use among carriers for many years would lead one to suppose that there was one limitation which was always understood to be expressed by the words "the liability shall not exceed the invoice value," or other words to that effect.

Now of the two possible constructions of such a clause, that adopted in *Pearse v. S. S. Co.* seems not only the better suited to the language there under consideration, but the more reasonable construction for any restriction of the kind, because, in all such cases, the amount of freight paid, which is the consideration for the carrier's liability as well as for the car-

riage, depends on the invoice value. In the principal case, for instance, the bill of lading excluded all liability over £100 per package, "unless the value is declared, and freight as may be agreed paid thereon," *i. e.*, proportionate to such value, and this was done. It is only reasonable that the carrier's liability should be proportionate to the freight received, and the language used in the principal case would seem to admit of this construction, but the Court's ruling is that the carrier is liable for so much of the value of the goods at the port of destination as does not exceed their invoice or declared value. This would put the shipper in a better position, relatively, if the loss were under the invoice value, than if it were over that amount, and conversely the carrier would have no inducement to preserve any goods that should become damaged to an extent equal to their invoice value, for total loss would not increase his liability.

Even in this view of the case, however, it does not follow that the measure of damages established in *The Lydian Monarch* and *Pearse v. S. S. Co.* ought to have been adopted. In the latter case, this measure of damages is inconsistent with the main part of the decision. The respondents had contended that the stipulation of the bill of lading should be construed as limiting their responsibility to the invoice value of the shipment *as a whole*, and that the carriers are not to be liable for any loss or damage, provided the shipper ultimately realizes at the port of destination the whole invoice value, as was the fact in that case. To this the Court replied: "The limiting clause in this case must be construed as applying distributively upon each article damaged, because that is the most natural meaning of the words, and best accords with the pre-

sumed intention of the parties. The clear intent was to provide not merely for the loss of the whole shipment, or for damage to the whole shipment, but for the loss of any part and for damage to any part. When it is stipulated that in case of damage or loss, the shipowner 'will not be liable for more than the invoice value of the goods,' the goods referred to are plainly the goods damaged, and those only, otherwise the clause would not be valid. The law makes the carrier liable for the loss or damage of *any* goods through his own negligence. Any stipulation that would annul this liability is void.

* * * If the construction contended for were the proper meaning of this limiting clause, it would be void upon grounds of public policy, as unreasonable, and as affording a direct encouragement to theft or non-delivery of the shipper's goods; for on every shipment, whether there was a loss or not, the carrier might without accountability appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole, a result destructive of all commerce, because enabling the carrier to appropriate all the profits." All this would command the assent of any reasonable man, but the Court goes on to say: "The net proceeds of the sale of the damaged goods, over all charges and expenses, if received by the owner, must therefore go in diminution of the invoice price and freight, and the carrier must pay the difference. * * * If [quoting from *The Lydian Monarch*] it should turn out that the libellant has received from the sale of the damaged goods the invoice price, after deducting the costs of importation, sale, etc., the libel will be dismissed."

This method of measuring the damages is wholly at variance with

what the Court said above: "The law makes the carrier liable for the loss or damage of *any* goods through his own negligence. Any stipulation that would annul this liability is void." The decision would free the carrier from all liability for damage where the net proceeds of the sale of the damaged goods were not less than the invoice price of those goods, plus the freight, and if the whole cargo were damaged equally, the carrier might escape liability on the whole. Again, the carrier might, under this decision, appropriate to his own use a part of all articles from which anything could be abstracted without ruining the whole, and escape liability in the manner in which the Court has said he shall not escape it.

The Court also said: "If the carrier should be allowed in ascertaining the amount for which he was liable to charge against the invoice price of the whole, the amount realized in a foreign market for the whole cargo, damaged and undamaged, that construction would be giving to the carrier the full benefit of the foreign market value, which is expressly denied to the shipper, a result not presumably within the intention of the parties." Now if the carrier cannot compute his liability in this way as to the whole cargo, why should he be allowed to do it as to the part damaged, by deducting the net proceeds of damaged goods from their invoice value, plus the freight?

The Court further held that its ruling "only applies to damaged goods carried to the port of destination, the same rule that has long been applied in courts of admiralty to the loss of goods at sea through collision, namely, that the value at the port of shipment and not at the port of destination shall control." In point of fact, however, the decision has no

such effect, but allows the carrier to deduct the value of the damaged goods at the port of destination from the value of the same goods undamaged at the port of shipment, adding only the freight.

The measure of damages adopted by the Court in *Pearse v. S. S. Co.*, is, however, not only inconsistent with the doctrine of the case, but is manifestly unjust. Where, by the contract of shipment, the carrier becomes an insurer to a certain extent, and under certain contingencies, it is unjust that when those contingencies occur he should, under any circumstances, be wholly free of liability. Where freight proportionate to an agreed value has been paid for the safe carriage of goods, certain risks only excepted, and the goods are damaged by other than the excepted causes, it is unjust that the shipper should not recover some part of the value for which it was agreed that the carrier should be liable. A contract to carry safely goods of a certain value, certain risks only excepted, in consideration of freight proportionate to such value, is, as to all other risks, precisely analogous to a valued policy of insurance, and the measure of damages for partial loss on such a policy would seem to furnish the true

rule here. It has long been settled that in such a case, whatever be the actual value of the goods insured, the proportion or percentage of loss is determined, and the insurer pays the same proportion or percentage of the total sum for which the policy makes him liable: *Lewis v. Rucker*, 2 Bur. 1167; *Lunns v. Edwards*, 12 East, 488; *Usher v. Noble*, Id. 639, 646; *Forbes v. Aspinwall*, 13 Id. 323; *Goldsmid v. Gillies*, 4 Taunt. 803; *Bonsfield v. Barnes*, 4 Camp. 228; *Irving v. Manning*, 1 H. L. Cas. 289, 306; 1 Arnold's Mar. Ins. (6th ed.) 300.

In *The Lydian Monarch and Pearse v. S. S. Co.*, therefore, the ratio of the estimated loss or damage to the whole value of the goods damaged should have furnished the ratio of the invoice value recoverable from the carrier.

As has been already said, the principal case was rightly decided, if the clause of limitation was rightly construed. If, on the other hand, as would seem more likely, the limitation contemplated by the parties was one of liability, not of damages, then the measure of damages above suggested could have been applied with justice to both parties.

CHARLES CHAUNCEY BINNEY.

Philadelphia.

Supreme Court of Vermont.

WORTHEN v. LOVE.

The owner of a dog, known to be vicious, has the right to keep him if he exercises proper care and diligence to secure him, so that he will not injure any one who does not unlawfully provoke or intermeddle with him.

EXCEPTIONS from Rutland County Court.

Action on the case to recover for injuries resulting from the bite of a dog. The Court assessed the damages at \$30, but